MAY 2 2 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

No. 968102

COMMONWEALTH OF PENNSYLVANIA

vs.

EDWARD NOVAK,
Appellant

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

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PETITION FOR CERTIORARI

Edward Novak, by his counsel, Walter Stein and Mervyn R. Turk, Esquires, prays that a Writ of Certiorari issue to review the decree of the Supreme Court of Pennsylvania in quashing petitioner's appeal to it.

OPINION BELOW

The opinion of the Supreme Court of Pennsylvania, quashing the appeal, is reported at 384 Pa. 237 and the Opinion of the Court of Oyer and Terminer of Delaware County (Pa.) is reported at District and County Reports.

JURISDICTION

The decree of the Supreme Court of Pennsylvania was entered on February 6, 1956. A petition for a reargument was filed with the Supreme Court of Pennsylvania on February 16, 1956 and refused by that Court on March 6, 1956. The jurisdiction of this Court is invoked under Section 1257(3) of Title 28 U.S.C., 28 U.S.C.A., Sec. 1257(3).

QUESTION PRESENTED

The question is whether a man indicted for murder, a capital offense, can be brought to trial, where due process is not observed in determining his sanity, particularly where the Commonwealth of Pennsylvania has by Statute (Mental Health Act) prescribed methods and procedures.

Furthermore, have petitioner's constitutional rights been violated by the refusal of the Supreme Court of Pennsylvania to hear hiis appeal raising inter alia, the questions arising under the Constitution of the United States.

STATUTES INVOLVED

The pertinent Sections of the Mental Health Act of 1951 (Pa. Act of June 12, 1951, P.L. 533, Art. I, Sec. 101, etc.; 50 Purdon Statutes, Sec. 1071, etc.:

50 P.S., Sec. 1072 (11):

"As used in this act, unless the context clearly indicates otherwise, the following words and phrases shall have the following meanings:

"(11) 'Mental illness' shall mean an illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care. The term shall include 'insanity', 'unsoundness of mind', 'lunacy', 'mental disease', 'mental disorder', and all other types of mental cases, but the term shall not include 'mental deficiency', 'epilepsy', 'inebriety', or 'senility', unless mental illness is superimposed."

50 P.S., Sec. 1225 (a):

"Within ten days of the receipt of an application for commitment, the clerk of court shall cause to be served written notice of the filing of the application on the prisoner's counsel, if he has any, and on his nearest available relative, or, in the absence of such, his nearest available friend, and shall endorse on the application the names of those notified. Thereupon, the court shall order an examination of the person sought to be committed by two qualified physicians or a commission.

Notice of the time and place of the psychiatric examination shall be given to the persons whose names are endorsed on the application by the clerk of court as aforesaid."

STATEMENT OF THE CASE

The petitioner was indicted for murder on March 9, 1955. While the petitioner was incarcerated in Delaware County prison, the court below authorized psychiatric examinations of the petitioner on petitions filed by his counsel, on February 25, 1955, and by the District Attorney on March 4, 1955.

On May 6, 1955, petitioner's counsel filed a petition for the commitment of petitioner to a mental hospital for observation, treatment and diagnosis or for care. This petition was filed pursuant to the Mental Health Act of 1951, June 12, P.L. 533. Counsel asserted that Edward Novak appeared to be mentally ill and his condition was such as to make it necessary that he be committed to a mental hospital (R. 9a).

On the same day President Judge Henry G. Sweney entered an order appointing a Commission "to investigate the condition of the prisoner" and to make its report to the court (R. 7a).

On May 13, 1955, the Commission held its first and only meeting. The Commission questioned the petitioner, called no other witnesses, gave petitioner's counsel no opportunity to present any evidence, and ignored a report of a psychiatric examination of petitioner handed to it (R. 105a). The Commission determined that counsel should not be present.

Petitioner's counsel called the attention of the Commission to various facts and offered to make evidence available to the Commission, stating "we are not waiving any of the rights of the defendant." (R. 18a)

On May 27, 1955, the Commission filed its Report. A copy of the Report was given to counsel for petitioner, but the transcript of the Commission's examination of the petitioner was retained by the Court and was denied to counsel even for use before and during the argument on the exceptions (R. 100a).

The Commission found that the petitioner, since childhood, suffered a profound personality disorder characterized by lack of moral and ethical standards; an intense masochistic striving; a lifelong predatory relationship with society; and a deeply disturbed psycho-sexual life (R. 84a). It further found that he showed marked hostility and aggression toward various members of society with whom he came into contact, including his own counsel; and that during the examination he went into violent rages, screaming, crying and beating his fists on the table (R. 84a-85a). The Commission further found that petitioner was of criminal tendency (R. 86a).

The Commission made no finding as to whether the condition of the petitioner was such as to make it necessary or advisable that he be cared for in a mental institution. Nor did it make any finding as to whether the condition of the petitioner was such as to make it necessary or advisable that he be committed to a mental hospital for observation, diagnosis and treatment. The Commission concluded, nevertheless, that the petitioner could distinguish right from wrong; that he was able to comprehend his position with relation to the crimes of which he stands accused;

and that he could confer with counsel and could make a rational defense (R. 86a).

On May 27, 1955, the court below accepted the Report of the Commission and entered an Order (By the Court, Toal, J.) refusing to commit petitioner to a mental institution for any purpose whatever. The court refused to hear evidence (R. 97a, 100a). The court also refused to allow petitioner's counsel to look at or examine the transcript of the "Hearing Before Sanity Commission", Judge Toal stating: "There will be no testimony, and I am personally keeping the notes of testimony on my desk, they are not a matter of record, they are advisory to the court" (R. 100a). The court ruled that there would be argument only on the report, Judge Toal stating, "We have, of course, filed the Report of the Sanity Commission as of today, and we will stick to the Report and argue exceptions on the report only." (R. 100a).

On June 6, 1955, following argument on the report only, an order was entered (By the Court, Bretherick, J.) dismissing petitioner's exceptions. An appeal to the Supreme Court of Pennsylvania followed, which on February 6, 1956 quashed the appeal on the ground that the action of the Court below was not appealable. A copy of the Court's opinion is hereto attached.

A petition for reargument was subsequently filed on February 16, 1956 again raising the constitutional questions here urged, but reargument was refused on March 6, 1956.

SPECIFICATION OF ERROR TO BE URGED

The State Courts erred in refusing the petitioner due process, as required by the Constitution of the United States, in failing to determine upon competent and complete evidence whether or not petitioner was mentally fit to stand trial or whether he was in need of medical care.

The Supreme Court of Pennsylvania specifically erred in refusing to hear petitioner's appeal, particularly in the light of a record which patently showed a gross violation of his constitutional rights.

REASONS FOR GRANTING THE WRIT

1. Cases are legion wherein your Honorable Court has struck down denial of due process. If the instant decision is permitted to stand, it will mean that a man can be put on trial for his life without adequate determination whether or not he is able to comprehend the nature of the proceedings against him and whether or not he can intelligently consult with counsel.

In Pennsylvania the Mental Health Act of 1951 provides procedural requirements and the test to be applied. The instant procedure is a flagrant violation of all of the law's requirements. The Commission refused counsel's presence, which would have aided in the orderly presentation of what was to be heard. The Commission refused to delve into sources of information considered fundamental

by those who know how intelligently and without bias to inquire into a man's mental health and more than that the Commission refused to consider such material as was actually offered it. Finally, the Commission ignored the test required by the Mental Health Act in its definition of "mental illness" (supra, p. 3) and found that the petitioner was able to distinguish right from wrong. This is error as the Supreme Court of Pennsylvania held in *Commonwealth v. Moon*, 383 Pa. 18 (1955).

2. The Supreme Court of Pennsylvania by quashing the appeal compounded the denial of due process. In holding the finding of the Commission and the action of the lower Court thereon to be not appealable it not only ignores reality but conflicts squarely with its own earlier rulings in *Commonwealth v. Moon*, supra; *Commonwealth v. Patskin*, 373 Pa. 368; *Commonwealth v. Ragone*, 317 Pa. 113; *Commonwealth v. Bechtel*, 384 Pa. 184.

In its opinion the Court seeks to distinguish this case from the others, where either the defendants have been convicted or found insane without trial. We consider this a most unrealistic distinction.

The present question before us is whether the petitioner can and should stand trial. When the procedures and tests as required by the "Mental Health Act" are applied it may result in a postponement of the trial until such time as petitioner is capable of making an intelligent defense.

To require that that question and the question of sanity going to his ability to distinguish right from wrong and thus face the consequences of his act be tried before and be determined by one and the same jury exceeds the concept

of due process. This view was expressed in the dissenting opinion of Chief Judge Biggs, in *Smith v. Baldi*, 192 F. (2d) 540, 553:

> "The procedure of having a defendant's guilt or innocence tried by the same jury which determines his sanity strains the modern concept of due process to the limit if it does not exceed the bounds of the Fourteenth Amendment."

This statement is elaborated and approved in the dissenting opinion of *United States v. Baldi*, 344 U.S. 561, 570.

There can be no doubt but that the *Smith* case would have gone the other way had it preceded the "Mental Health Act" which followed it and made Justice Frankfurter's and Chief Judge Biggs' view the law of the Commonwealth of Pennsylvania. By ignoring, therefore, the mandate of the Legislature, the violation of due process has become a reality and an examination of this important question becomes most urgent.

3. The question presented here is a novel one in that the Legislature of Pennsylvania has provided a pretrial procedure to determine a man's sanity. A denial of due process in such a proceeding is a serious and important point for consideration.

CONCLUSION

Because the petitioner faces a trial for his life unable to defend himself and because the harm will be irreparable and because this harm will be the result of the denial of

petitioner's constitutional rights, it is respectfully submitted that the instant petition for the Writ of Certiorari be granted.

EDWARD NOVAK,
Petitioner.

By his counsel:

WALTER STEIN
MERVYN R. TURK

Of counsel:

BERGER AND GELMAN

OPINION OF THE SUPREME COURT OF PENNSYLVANIA

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 33 January Term, 1956

Commonwealth of Pennsylvania

v.

Edward Novak,

Appellant

Appeal from Order of the Court of Oyer and Terminer of Delaware County at No. 340 etc. of March Term, 1955.

OPINION OF THE COURT

Jones, J. Filed: February 6, 1956

This appeal is from an order of the Court of Oyer and Terminer of Delaware County dismissing defendant's exceptions to the court's order accepting and approving the report of a sanity commission and refusing to commit the defendant to a hospital for the mentally ill.

The defendant was charged on March 9, 1955, with murder in indictments returned by the Delaware County grand jury. On May 6th, while he was confined in jail

awaiting trial, his counsel petitioned the court under the provisions of the Mental Health Act of June 12, 1951, P. L. 533, as amended, 50 PS §1071, et seq., for the defendant's commitment to a mental hospital. On the same day, the court entered an order appointing a commission consisting of two qualified physicians and an attorney to investigate the defendant's condition and to report therein to the court.

Following a psychiatric and neurologic examination of the defendant, the commission on May 27, 1955, filed with the court its report wherein it found that the defendant was not mentally defective; that there was no evidence of organic disease of his nervous system; that, although he showed a marked personality disorder leading to all kinds of aggressive and anti-social behavior, he is not mentally ill; that he is not insane; that he was able to comprehend his position with relation to the crimes for which he stands indicted, to confer with his counsel in an intelligent manner, to prepare his defense if he so desires and to make a rational defense.

After consideration of the commission's report and the evidence whereon it was based, the court entered its above-mentioned order of May 27th which, in part, contained the following: "* * * said defendant Edward Novak is not in such condition as to make it necessary that he be cared for in a hospital for mental illness and this Court does therefore refuse to commit said defendant, Edward Novak, as requested in the prayer of the petition heretofore filed." Exceptions to this order and the commission's report were dismissed by the court en banc. This appeal by the defendant followed.

The Commonwealth has filed a motion to quash on the ground that the appeal is from an interlocutory order. That

the order is interlocutory no one denies. Appellant's counsel concede that it is interlocutory but contend that, in the circumstances, it is appealable nonetheless.

As a general rule, an appeal will not lie in a criminal proceeding until judgment of sentence has been passed. It has been said, however, that this rule is not one of unyielding inflexibility. Where the interlocutory order, for all practical purposes, presents a somewhat final aspect, an appellate court will review it in order to safeguard basic human rights or to prevent a great injustice to a defendant. In *Commonwealth v. Trunk*, 311 Pa. 555, 565, 167 A. 333, it was said that "While it may be true generally that appeals may not be taken in criminal proceedings where judgment of sentence has not been passed, this rule should not be held one of universal application. There are instances where great injustice would thereby be done to defendants." In that case the trial court suspended sentence on bills upon which it did not act. We allowed an appeal and held that the action of the court below constituted an abuse of judicial discretion. In *Commonwealth v. Patch*, 98 Pa. Superior Ct. 464, a suspension of sentence after conviction was likewise held to be appealable. In *Commonwealth v. Ragone*, 317 Pa. 123, 126, 176 A. 454, the Commonwealth asserted that the defendant's appeal was premature because there was no entry of judgment on the verdict in the court below. In that case the defendant's trial for murder was abortive from the beginning, the defendant being admittedly insane. Nevertheless, the case was permitted to go to the jury which returned a verdict of guilty. In entertaining the appeal to this court, Mr. Justice Maxey said "It is true that the rule is that 'there must be a final judgment or something in the nature of a final judgment before

it is ripe for review in this court': Com. v. Ruth, 104 Pa. 294, 297. But this rule has, in exceptional cases and to safeguard basic human rights, been construed as not being one of unyielding inflexibility."

The appellant's current situation does not present a case of an appealable interlocutory order. He is not in danger of losing any right with respect to a conclusive determination of his mental health. He has not yet been brought to trial. If, upon trial, the jury should find him guilty of the crime charged, he can thereafter petition for a sanity commission to examine into his mental condition, and an order ultimately entered in such proceeding would be appealable: see *Commonwealth v. Patskin*, 375 Pa. 368, 100 A. 2d 472, and *Commonwealth v. Moon*, 383 Pa. 18, 117 A. 2d 96.

In *Commonwealth v. Patskin*, supra, the petition for a commission to examine into and report on the defendant's mental condition was not filed until after he had been convicted of murder in the first degree and sentenced to death in accordance with the jury's verdict. The Court, disapproving the commission's report that the defendant was mentally ill and a proper subject for commitment to a hospital, concluded that he was sane and not suffering mental illness. Thereupon the court vacated an extant stay of execution which operated as a dismissal of the petition for commitment. With execution thus facing the defendant, the order rejecting the petition was, of course, appealable under the rulings in the *Trunk* and *Ragone* cases, supra. Likewise, in *Commonwealth v. Moon*, supra, the defendant was tried and convicted of murder in the first degree with sentence fixed by the jury at death. After verdict but before sentence had been imposed, a petition for the appoint-

ment of a commission to examine into the defendant's mental health was filed and a commission was duly appointed. After hearings, the commission reported to the court that the defendant was in fact mentally ill, that the illness was chronic and continuing, and that the defendant was a proper subject for commitment to a mental hospital. The court reviewed the sanity commission's report and the evidence whereon it was based and, concluding that the defendant was legally sane, entered an order directing that the criminal proceedings continue; a motion of the defendant for a new trial was then pending. Here, also, the court's order was appealable because of its relative finality in the circumstances.

In *Commonwealth v. Bechtel*, p. ante (handed down this day), the defendant, indicted for murder, had not yet been brought to trial. Nevertheless, we entertained his appeal from the trial court's approval and adoption of the report of a sanity commission finding him mentally ill and a person of criminal tendency. The commission recommended that the defendant be committed to Farview State Hospital, and the court accordingly entered an order to that effect. The reason the order was appealable is obvious. It was final unless and until the court at some time in the future might possibly find that the defendant has been restored to mental health and rescinds the order of commitment. Furthermore, the appeal was not for the purpose of questioning the finding that the defendant was mentally ill and a proper subject for immediate hospitalization but to complain of the character of the institution to which he was committed. Unless that question could be at once reviewed on appeal, it would necessarily become moot since the defendant would continue to remain in the institution

to which he o[bjected. The *Bechtel* case is plainly distin-
guishable fro[m the present. In the former the defendant
was committe[d for what might prove to be the balance of
his life while [in the present case the defendant was found
not to be ment[ally ill and is left entirely free to litigate his
mental condit[ion further if, upon trial for the crime
charged, he is [found guilty.

Appeal qf[ashed.

Mr. Justi[ce Musmanno dissents.

ORDER [ON PETITION FOR REARGUMENT

"Order

March 6, [1956, the within petition is denied.

Per Curiam."

JUN 8 1956
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

No. 102

COMMONWEALTH OF PENNSYLVANIA

vs.

EDWARD NOVAK,

Petitioner

BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

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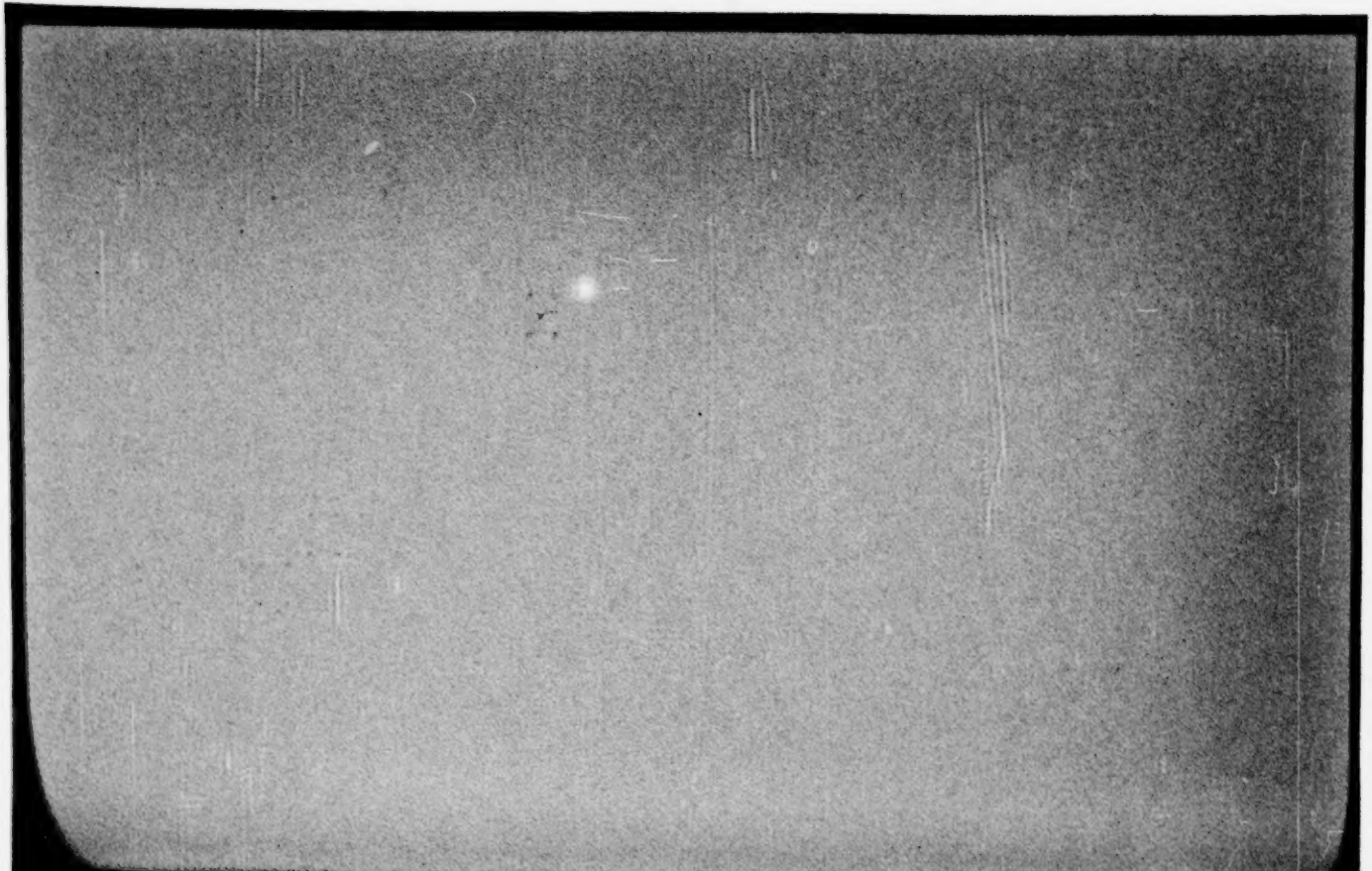

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JURISDICTION

The Supreme Court of Pennsylvania on February 6, 1956, quashed the appeal of the within defendant from an order of the Court of Oyer and Terminer of Delaware County, Pennsylvania, dismissing defendant's exceptions to the order of said court in which it accepted and approved the report of a sanity commission and refused to commit said defendant to a hospital for the mentally ill. A petition for reargument was filed with the Supreme Court of Pennsylvania on February 16, 1956, and denied by that Court on March 6, 1956. The jurisdiction of the Supreme Court of the United States is invoked by the defendant under Section 1257 (3) of Title 28, United States Code Annotated.

It is contended by the Commonwealth of Pennsylvania that since the decree of the Supreme Court of Pennsylvania was not a final judgment the Supreme Court of the United States has no jurisdiction and the matter is not subject to review.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is the decree of the Supreme Court of Pennsylvania, wherein it quashed the appeal of the defendant, such a final judgment as may be reviewed by the Supreme Court of the United States?

2. Was due process observed in the examination of the defendant and was it in accordance with the prescribed methods and procedures set forth in the Mental Health Act of June 12, 1951, P. L. 533, as amended?

3. Were the defendant's constitutional rights violated by the refusal of the Supreme Court of Pennsylvania to hear his appeal?

COUNTER-STATEMENT OF STATUTES INVOLVED

The pertinent section of the Code of the Laws of the United States of America is Section 1257 (June 25, 1948, c. 646, 62 Stat. 9) as follows:

> "*Final judgments or decrees* rendered by the highest court of a State in which a decision could be had, *may be reviewed* by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question, on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Counter-Statement of Statutes Involved

The pertinent sections of the Mental Health Act of 1951, June 12, P. L. 533, Article I, Section 101 (50 Purdon's Statutes, Section 1071), are as follows:

(50 P.S. 1072 (11)) "'Mental illness' shall mean an illness which *so lessens* the capacity of a person to use his customary self control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care. The term shall include 'insanity', 'unsoundness of mind', 'lunacy', 'mental disease', 'mental disorder', and all other types of mental cases, but the term shall not include 'mental deficiency', 'epilepsy', 'inebriety', or 'senility', unless mental illness is superimposed."

(50 P.S. 1225 (a)) "Within ten days of the receipt of an application for commitment, the Court shall cause to be served written notice of the filing of the application on the prisoner's counsel, if he has any, and on his nearest available relative, or, in the absence of such, his nearest available friend, and shall endorse on the application the names of those notified. Thereupon, the Court shall order an examination of the person sought to be committed by two qualified physicians or a commission. Notice of the time and place of the psychiatric examination shall be given to the persons whose names are endorsed on the application by the clerk of court as aforesaid."

COUNTER-STATEMENT OF THE CASE

The defendant was indicted for murder by the Grand Jury of Delaware County at the March Sessions of 1955, and on May 6, 1955, defendant's counsel in accordance with the provisions of the Mental Health Act of 1951, as amended, filed a petition for the commitment of the defendant to a mental hospital, averring that "such prisoner is in such condition as to make it necessary that he should be cared for in a hospital for mental illnesses". On May 6, 1955, the Lower Court appointed a sanity commission consisting of two qualified physicians and an attorney-at-law to investigate the mental condition of the defendant and to report thereon (R. 7a).

The Commission thereupon proceeded to make a psychiatric examination of the defendant and a neurological examination was performed independently by the two physicians. In due course the Commission filed its report in which it found, inter alia, that the defendant was not mentally defective; that there was no evidence of organic disease of the nervous system; that he showed a profound personality disorder that has led to all types of aggression and anti-social behavior, but that he was not mentally ill; that he was not insane; that he could distinguish right from wrong; that he was able to comprehend his position with relation to the crimes of which he stood accused; that he was able to confer with his counsel in an intelligent manner to prepare his defense, if he so desired; that he was able

to make a rational defense to the crimes of which he stood accused; and that he was of criminal tendency (R. 74a).

It might be mentioned that defendant's counsel at no time requested of the Sanity Commission the right to present any evidence, to participate in the examination or to be present. On the contrary, at the very beginning of the proceedings before the Commission, defendant's counsel specifically stated, and it is a matter of record (R. 18a, 19a, 21a), that he had no objection to whatever procedure the Commission felt would be in the interests of justice and would obtain the best results.

After a thorough study of the Commission's report and the facts upon which it was based, the Lower Court in the exercise of its independent judgment entered an order on May 27, 1955, wherein it decreed that the defendant was not in such condition as to make it necessary that he be cared for in a hospital for mental illnesses, and the lower Court did, therefore, refuse to commit the defendant as requested in the prayer of the petition filed for his commitment (R. 99a).

Defendant's exceptions to this order and the Commission's report were argued before the Court en banc on May 31, 1955, on memorandum briefs, and on June 6, 1955, after due consideration, the Lower Court entered an order dismissing defendant's exceptions.

An appeal to the Supreme Court of Pennsylvania followed, and argument was had thereon. The Commonwealth of Pennsylvania not only answered the appeal on its merits but also moved the Supreme Court of

Pennsylvaniato quash the appeal by reason of the fact that the order of the Lower Court was interlocutory and not a final judgment. On February 6, 1956, the Supreme Court of Pennsylvania quashed the appeal on the theory that it was from an interlocutory order and that it did no contain such exceptional circumstances as would make it appealable.

A petition for reargument was subsequently filed on February 16, 1956, again raising the identical questions, and on March 6, 1956, reargument was refused.

ARGUMENT

1. IS THE DECREE OF THE SUPREME COURT OF PENNSYLVANIA, WHEREIN IT QUASHED THE APPEAL OF THE DEFENDANT, SUCH A FINAL JUDGMENT AS MAY BE REVIEWED BY THE SUPREME COURT OF THE UNITED STATES?

Admittedly the procedures here involved were taken pursuant to the Mental Health Act of 1951, June 12, P. L. 533, as amended, 50 P.S. 1071 et seq., but neither the order of the Lower Court nor the quashing of defendant's appeal by the Supreme Court of Pennsylvania in any way constitutes a final determination of the question raised by the defendant. The Lower Court rejected the contention of the defendant on the theory that the current situation did not present a case of an appealable interlocutory order. The defendant was not in danger of losing any right with respect to a conclusive determination of his mental health. He had not yet been brought to trial. If upon trial the jury should find him guilty of the crime charged, he could thereafter petition for a sanity commission to examine into his mental condition, and an order ultimately entered in such a proceeding would be appealable. See *Comm. vs. Patskin*, 375 Pa. 368, 100 A. 2nd 472; and *Comm. vs. Moon*, 383 Pa. 18, 117 A. 2nd 96.

As a general rule, an appeal will not lie in a criminal proceeding until judgment of sentence has been

passed. It has been said, however, that this rule is not one of unyielding inflexibility. Where the interlocutory order, for all practical purposes, presents a somewhat final aspect, an appellate court will review it in order to safeguard basic human rights or to prevent great injustice to a defendant.

In *Comm. vs. Trunk,* 311 Pa. 555, 167 A. 333, it was said that "while it may be true generally that appeals may not be taken in criminal proceedings where judgment of sentence has not been passed, this rule should not be held one of universal application. There are instances where great injustice would thereby be done to defendants." The Appellate Court in that case allowed an appeal, and held that the action of the Court below constituted an abuse of judicial discretion. In *Comm. vs. Patch,* 98 Pa. Superior Ct. 464, the suspension of sentence after conviction was likewise held to be appealable. In *Comm. vs. Ragone,* 317 Pa. 113, 176 A. 454, the Commonwealth asserted that the defendant's appeal was premature because there was no entry of judgment on the verdict in the Court below. In that case the defendant's trial for murder was abortive from the beginning, the defendant being admittedly insane. Nevertheless the case was permitted to go to the jury, which returned a verdict of guilty. In entertaining the appeal to the Supreme Court of Pennsylvania, Mr. Justice Maxey said:

> "It is true that the rule is that 'there must be a final judgment or something in the nature of a final judgment before it is ripe for review in this Court': Comm. vs. Ruth, 104 Pa. 294. But this rule has, in exceptional cases and to safeguard

basic human rights, been construed as not being one of unyielding inflexibility."

In *Comm. vs. Patskin,* supra, the petition for a commission to examine into and report on the defendant's mental condition was not filed until after he had been convicted of murder in the first degree and sentenced to death in accordance with the jury's verdict. The Court, disapproving the Commission's report that the defendant was mentally ill and a proper subject for commitment to a hospital, concluded that he was sane and not suffering mental illness. Thereupon the Court vacated an extant stay of execution which operated as a dismissal of the petition for commitment. With execution thus facing the defendant, the order rejecting the petition was, of course, appealable under the rulings in the *Trunk* and *Ragone* cases, supra. Likewise in *Comm. vs. Mixon,* supra, the defendant was tried and convicted of murder in the first degree with sentence fixed by the jury at death. After verdict but before sentence had been imposed, a petition for the appointment of a commission to examine into the defendant's mental health was filed, and a commission was duly appointed. After hearings, the commission reported to the Court that the defendant was in fact mentally ill, that the illness was chronic and continuing, and that the defendant was a proper subject for commitment to a mental hospital. The Court reviewed the Sanity Commission's report and the evidence whereon it was based and, concluding that the defendant was legally sane, entered an order directing that the criminal proceedings continue. A motion of the defendant for a new trial was then pending. Here also the Court's order

was appealable because of its relative finality in the circumstances.

Obviously there is nothing so exceptional about the present status of the defendant as to bring him within the "exceptional cases," set forth herein, or that requires a departure from the well-established rule. This long-established principle of non-appealability of interlocutory orders, especially in criminal cases, prevents piecemeal determination of such cases and thus enables the Court to more wisely and justly determine the questions involved in the light of all the facts and circumstances as disclosed by the evidence in the entire record. Equally important, it eliminates costly and time-consuming delays in the orderly and speedy administration of justice, and places a needed restriction upon the well-known practice of criminals to obstruct or defeat justice by resorting to every conceivable technicality, dilatory motions and delaying tactics.

Defendant takes the position that nothing further remains to be done in respect to the question of commitment under the Mental Health Act of 1951, as amended, and concludes therefrom that the order of the lower Court refusing the commitment and that of the Supreme Court of Pennsylvania quashing the appeal is a final determination. This could not be further from the truth inasmuch as neither of these decrees forecloses the possibility of further and additional similar petitions. As stated in said Act (50 P.S. Sec. 1224 (2b)) an application for commitment may be made by counsel for the prisoner or the superintendent, warden, jail physician, or by any responsible person, and at any time. To permit an appeal therefrom prior to a final

determination or judgment might bring about a series of such petitions followed by appeals which would prevent the orderly trial of defendants for years, during which time circumstances might bring about changes which would make it possible for criminals to obstruct and to defeat justice. Such a situation or condition should be prevented by our courts whenever reasonably possible.

A judgment of an appellate court, to be final and reviewable, must end the litigation by fully determining the rights of the parties so that nothing remains to be done by the trial court except the ministerial act of entering judgment which the appellate court directed. *Gospel Army vs. City of Los Angeles*, 67 S. Ct. 1428, 331 U. S. 543.

We find also in *Arnold vs. U. S. for use of W. B. Guimarin and Co.*, 44 S. Ct. 144, 263 U. S. 427, the following:

> *"a judgment, to be reviewable by the federal Supreme Court, must be not only final, but complete; that is, final, not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved."*

No judgment is final which does not terminate the litigation between the parties, and in the instant case the refusal of the Supreme Court of Pennsylvania to entertain defendant's appeal did not in any way terminate the litigation between the parties, the defendant having other means of determining his mental condition not only prior to trial but also during the trial itself, as well as following conviction, if and when the defendant is convicted by a jury.

In the light of the above, and for the reasons set forth herein, it is clear that the quashing of defendant's appeal by the Supreme Court of Pennsylvania was not such a final judgment as may be reviewed by the Supreme Court of the United States.

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2. WAS DUE PROCESS OBSERVED IN THE EXAMINATION OF THE DEFENDANT AND WAS IT IN ACCORDANCE WITH THE PRESCRIBED METHODS AND PROCEDURES SET FORTH IN THE MENTAL HEALTH ACT OF JUNE 12, 1951, P. L. 533, AS AMENDED?

What are the proper standards for the commitment of a defendant under the Mental Health Act of 1951, as amended? The Supreme Court of Pennsylvania but recently held in *Comm. vs. Moon,* supra, that while the rule of *McNaghten's Case,* 8 Eng. Rep. 718, and subsequently adopted as the law of Pennsylvania in *Comm. vs. Mosler,* 4 Pa. 264, still remains the law of the Commonwealth of Pennsylvania when insanity is pleaded at trial, yet this rule known as the "right or wrong" test is not to be employed by the Courts in determining the mental capacity of a defendant to stand trial or to be sentenced or executed. *The proper test is whether the defendant is able to comprehend his position and make a rational defense.*

The Mental Health Act of 1951, as amended, defines the term "mental illness" in Section 102 (11), but this does not mean that every conceivable type of mental illness falls within the scope of the Act and requires

commitment. It is evident, and the Courts of the Commonwealth of Pennsylvania have so held, that the controlling factor is the degree or extent to which the mind is affected by the mental disorder, and not the bare existence of symptoms which might induce a psychiatrist to diagnose a mental illness. This conclusion is confirmed by Section 343 (c) of the Act which provides that "on the report of the examiner that the defendant is *so* mentally ill or defective that it is advisable for his welfare or the protection of the community that he be committed to other than a penal or correctional institution, the Court may commit him, * * * If the examiner's report indicates *no such* mental illness or deficiency, he shall be sentenced as in other cases."

The Commission appointed by the lower Court clearly followed the standards which the Legislature promulgated to guide not only it but the Court. Under Section 345 (d) of the Act, it is the Court and not the Commission which must be satisfied that the defendant is mentally ill under the standards prescribed. It follows that the lower Court in the instant case could have rejected, although not arbitrarily or capriciously, the Commission's findings and conclusions and could have independently determined from the evidence that the defendant's capacity to use his customary self-control, judgment and discretion had not been *so lessened* that it was necessary or advisable for him to be under care. The lower Court, however, agreed that the findings of the Commission were amply borne out by the record of the examination of the defendant by the Commission.

It is clear from a reading of the record, as well as what is cited above, that the Commission properly ap-

plied the standards of the Mental Health Act of 1951, as amended, in making their conclusions, and their findings were amply supported by the evidence.

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3. WERE THE DEFENDANT'S CONSTITUTIONAL RIGHTS VIOLATED BY THE REFUSAL OF THE SUPREME COURT OF PENNSYLVANIA TO HEAR HIS APPEAL?

As has been stated by the petitioner, the question is whether he can and should stand trial. It was the opinion of the lower Court, after mature and deliberate study of the Commission's report, that it had discharged its duties with fidelity, ability and complete impartiality. The report itself gave every evidence of thorough, painstaking consideration and preparation. There were no inconsistencies or contradictions in the Commission's findings and conclusions, and the lower Court found nothing during their opportunities to observe the defendant, his bearing, appearance or demeanor which was suggestive of mental illness.

The petitioner contends that the Commission refused to permit his counsel to be present. The record indicates, however, that counsel for the defendant never at any time asked for an opportunity to be present nor requested the opportunity of producing evidence or testimony. The Commission did not ignore a report of a psychiatric examination handed to it by defendant's counsel, and there is no evidence of such a report having been given to the Commission. The report in question did not come into the record until it

was attached as an exhibit to the defendant's answer to the Commonwealth's supplemental motion to quash the appeal from the order of the lower Court dismissing defendant's exceptions to the Commission's report.

The petition for a commission to determine a defendant's mental condition, and the proceedings thereunder, is not a criminal prosecution but a collateral proceeding to determine the mental health of the person involved for his benefit, or for the benefit of the public, or both. Inquiries into the mental health or sanity of a petitioner, whether made before trial or after conviction and before sentence, are "to inform the conscience of the judge": *Comm. vs. Iacobino*, 319 Pa. 65, 178 A. 823; *Comm. vs. Scovern*, 292 Pa. 26, 140 A. 611. Where an inquiry is made into the mental illness or sanity of a defendant, the purpose of which is solely to inform the conscience of the court, the accused does not have under the constitution a right to a trial of such issue by a jury. See *Comm. vs. Iacobino*, supra, and *Comm. vs. Patskin*, supra.

Federal due process does not go so far as to require a hearing on mental condition in any particular manner or at any particular state in the proceedings, and the most that it requires is an opportunity to have adequate hearing on the question before guilt is finally determined. *United States ex rel. Smith vs. Baldi*, 192 F. 2nd 540.

We find also in *United States ex rel. Smith vs. Baldi*, 344 U. S. 561, that "under Pennsylvania law, it is within trial judge's discretion to submit preliminary question of defendant's sanity to a special jury, but he may defer request and allow questions to be decided by jury trying indictment."

The constitutional rights of the defendant were protected throughout the proceedings; and, there being no final determination of the question of either sanity or the mental condition of the defendant, the refusal of the Supreme Court of Pennsylvania to hear defendant's appeal did not violate his constitutional rights.

CONCLUSION

It is respectfully submitted that there was a proper determination of the defendant's mental condition at the time of his examination before the Commission; that the Commission's conclusions were entirely consistent with the Mental Health Act of 1951, as amended; that the decree of the Supreme Court of Pennsylvania wherein it quashed the appeal of the defendant was not a final judgment and so may not be reviewed by the Supreme Court of the United States; that due process was observed in the examination of the defendant and it was in accordance with the methods and procedures prescribed in the Mental Health Act of 1951, as amended; that the defendant's constitutional rights were in no way violated either by the quashing of his appeal by the Supreme Court of Pennsylvania or by the refusal of said Court to hear his appeal; and therefore that the petition of the defendant for a writ of certiorari be refused.

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